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No. 02-154

IN THE SUPREME COURT OF THE UNITED STATES

JOHN SEXTON,
Petitioner,

v.

MIKE KEMNA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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Statement of the Case

Petitioner John Sexton was convicted in the Circuit Court of Jackson County, Missouri, of one count of rape and five counts of sodomy, and the court sentenced petitioner to twenty years imprisonment on each sodomy count, the sentences to be served concurrently to each other and consecutively to the sentence of twenty years imprisonment on the rape count. Pet. App. at 69a. The Missouri Court of Appeals reversed petitioner's sentences and remanded for new trial because improper evidence of petitioner's prior sexual conduct was introduced. Pet. App. at 69a-74a. At retrial, petitioner was acquitted of the rape charge and convicted on each of the five sodomy charges, for which the court sentenced him to five concurrent forty-year sentences. Pet. App. 54a-68a. The Missouri Court of Appeals affirmed four of the five convictions, but reversed one sodomy conviction due to insufficient evidence. Id.

The Missouri Court of Appeals stated the sordid facts of petitioner's crimes as follows.

> At the time of trial the victim, R.C., was eighteen years old. When she was approximately nine years old, her mother, Kathleen Sexton, married appellant. Appellant and his young son, Jessie, began living with R.C. and her mother in Lee's Summit, Missouri.
>
> Within five or six months, appellant began subjecting his stepdaughter to a variety of physical and sexual abuse. He ordered her to kiss him on the lips and when she refused, he

punched her with his fist in the mouth. When she still refused, he punched her in the nose and she finally acquiesced and kissed him on the lips.

Shortly after the abuse began, appellant removed all of her clothes, put her in a big yellow shirt, took her downstairs to the kitchen and turned on the garbage disposal. He placed her hand over the disposal and warned her that he would put her down there if she told anyone. He also told her that if she ever tried to leave or if she ever told on him that he would kill her.

When she was ten years old, a few months after he had forced her to kiss him on the lips, appellant placed his penis in her mouth and forced her to suck it. He would usually make her swallow the "white stuff" that came out of his penis when he ejaculated. He forced her to perform oral sex between three and four times a week. The incidents normally occurred in the morning when her mother was at work.

R.C. testified that over the period of time she lived with appellant, he placed his penis in her vagina, touched her vagina with his fingers and tongue, touched her breasts with his fingers and his mouth, and her "bottom" with his penis and his hands. She testified that she remembered on one occasion when she was ten or eleven,

appellant bent her over the coffee table and pulled her pants down. He then inserted his penis into her rectum causing her bottom to bleed. On numerous other occasions appellant placed his penis in her vagina. These incidents of penile-genital conduct occurred in the bedroom at the family's home and in the family's trailer at Truman Lake.

At some point, appellant and her mother placed R.C. on birth control pills against her will. She was told that it was a precautionary measure to prevent against pregnancy in case somebody raped her because appellant didn't want her to get pregnant.

Appellant also used oral sex as a disciplinary tool and control mechanism. R.C. was given the choice between being whipped on the bare buttocks with a thick belt or performing oral sex whenever she needed to be punished. She normally chose the whippings which left marks and bruises on her arms, chest, legs and knees.

R.C. described an incident where appellant grabbed her by the hair and threw her down the stairs. She testified that he would hit her with his fists and throw various objects at her including tools, pencils, pillows, shoes and other items. Appellant would also force her to do something sexually if she wanted to socialize with her friends.

> On November 10, 1992, following an incident of sexual abuse at Truman Lake, R.C. reported the abuse to the Lee's Summit police. She was removed from the home and placed in foster care temporarily before going to reside with her biological father.

Pet. App. at 55a-57a.

After exhausting his remedies in the Missouri State courts, petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Western District of Missouri. The District Court denied all of petitioner's claims, Pet. App. 22a-51a, but granted a certificate of appealability on five issues, Pet. App. 18a-21a. Petitioner appealed to the Eighth Circuit, and that court affirmed the district court, Pet. App. 1a, and subsequently denied rehearing by the panel and *en banc*, Pet. App. 75a. This petition for writ of certiorari followed.

ARGUMENT

I. The Eighth Circuit correctly found that the Missouri Court of Appeals' decision was not contrary to or an unreasonable application of this Court's precedent.

The Missouri Court of Appeals held that petitioner's resentencing did not violate this Court's holding in Pearce v. North Carolina, 395 U.S.711 (1969). The Missouri court held that trial judges, when resentencing a defendant on multiple counts following a successful appeal, may reevaluate the "package" of sentences given at the original sentencing, adopting the Seventh Circuit's position in United States v. Shue, 825 F.2d 1111, 1114 (7th Cir.), *cert. denied* 484 U.S. 956 (1987). Pet. App. At 58a. The Missouri court then found that no violation of Pearce had occurred in petitioner's case because petitioner's new sentences were no greater than the sentences originally imposed. Id.

The Eighth Circuit found that the Missouri Court's decision was reasonable. The Eighth Circuit stated that the standard of review for this 28 U.S.C. §2254 claim under the Anti-terrorism and Effective Death Penalty Act (AEDPA) was as follows:

> The Anti-terrorism and Effective Death Penalty Act of 1996 amended the federal habeas corpus statute to provide that relief may not be granted to a person in state custody unless the underlying state proceeding:
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court

> of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> 28 U.S.C. § 2254(d). The Supreme Court recently clarified the proper interpretation § 2254(d)(1). Writing for a majority of the Court on this issue, Justice O'Connor explained that the "contrary to" clause limits habeas relief to cases in which "the state court arrives at a conclusion opposite to that reached by this Court on a question of law or . . . decides a case differently than this Court has on a set of materially indistinguishable facts." The "unreasonable application" clause permits the writ to issue only "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams v. Taylor, 529 U.S. 362, 402-13, 146 L. Ed. 2d 389, 120 S.Ct. 1495 (2000).

Pet. App. at 3a-4a. The Eighth Circuit found that the Missouri Court's opinion was not an unreasonable application of this Court's precedent because other courts had adopted the same rule that the Missouri Court of Appeals did and because this Court had not extended its decision in Pearce to cover resentencing on multiple counts. Pet. App. at 6a-7a.

A. The Eighth Circuit correctly found that the Missouri Court of Appeals' decision is not contrary to any decision of this Court

Petitioner concedes in his petition for certiorari that this Court has not ruled on the question that he presents. Pet. at 5, 21. A state decision is "contrary to" clearly established federal law only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 435 (2000). As this Court has not ruled on this question, the Missouri Court of Appeals' ruling cannot be contrary to a (nonexistent) ruling from this Court.

B. The Eighth Circuit correctly found that the Missouri Court of Appeal's decision is not an unreasonable application of clearly established federal law.

The Eighth Circuit's decision, and the decision of the Missouri Court of Appeals, are reasonable and correct within the meaning of 28 U.S.C. §2254(d)(1). This Court stated that a decision is based on "an unreasonable application of clearly established federal law" if the state court correctly cites the governing legal principles from the Supreme Court but "unreasonably applies that principle to the facts of the prisoner's case." Id. This standard is objective, rather than subjective. Williams, 529 U.S. at 409. An unreasonable application of federal law is different from an incorrect application of federal law. Id. at 410. A federal court may not issue the writ simply because it concludes, in its independent judgment,

that the state court applied clearly established federal law erroneously or incorrectly. Id. at 411. Rather, the application must also be objectively unreasonable. Id.

In the case at bar, petitioner contends, and has thoroughly and admirably researched, that seven circuits, including the Eighth Circuit, and two state courts of last resort follow the position adopted by the Missouri Court of Appeals that Pearce analysis for resentencing on multiple counts compares the aggregate "package" of the original and new sentences. Pet. at 7. Petitioner also correctly points out that the District of Colombia Circuit utilizes a modified version of the above test that looks at whether the sentences could have been viewed as a "package" at the time of the original sentence. Pet. at 9. Petitioner's research shows that three circuits and one state court of last resort have adopted a "remainder" rule allowing comparison only of the original sentences and the subsequent sentences for those counts that were not dropped or reversed, that the Illinois and Pennsylvania Supreme Courts compare sentences count by count, and that the New York Court of Appeals has not established a rule but considers each case on its own merits. Pet. at 9-11.

The diversity among these courts to the question at hand show that reasonable jurists differ about what the correct answer to petitioner's question is. The position taken by the Missouri Court of Appeals and the Eighth Circuit is not unreasonable simply because the Second Circuit, the Eleventh Circuit, the Fourth Circuit, and the Supreme Courts of Connecticut, Illinois, and Pennsylvania disagree with it. The fact that courts are split on this issue is evidence that both sides of this question have a reasonable basis in law.

This Court in Williams stated that in order to satisfy the "reasonableness" prong of §2254(d), a decision must be objectively unreasonable. Williams, *supra*, 529 U.S. at 411. This Court stressed that an incorrect decision is distinct from an unreasonable decision. Bell v. Cone, __U.S.__, 122 S.Ct. 1843, 1850, 152 L.Ed.2d 914 (2002), Williams, *supra*, 529 U.S. at 409-10. The question of whether the Eighth Circuit may or may not be correct in its interpretation of Pearce, to which petitioner devotes nearly his entire petition, is thus irrelevant to the case at bar. The only question is whether the Eighth Circuit was correct in finding that the Missouri Court of Appeals' decision was reasonable. The current debate among courts about how to apply this Court's decision in Pearce to cases involving resentencing on multiple counts shows that the Missouri Court of Appeals' decision was reasonable. Therefore, in holding that the Missouri Court of Appeals' decision that petitioner's sentence was constitutional in light of Pearce was not an unreasonable application of clearly established federal law, the Eighth Circuit correctly stated and applied the law as stated by this Court, and certiorari is not warranted on this point.

Further, as the Eighth Circuit applied the correct AEDPA standard of review in this case, any review of this case would only involve the Eighth Circuit's misapplication of the AEDPA standard. As the Court's Rule 10 states, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of ... the misapplication of a properly stated rule of law." This Court in Williams v. Taylor and Bell v. Cone has established the standard of deciding AEDPA cases. Any resolution of this point by this Court would not establish any new law but would be fact-intensive to this case as the correct standard already exists. Therefore, this case is not a case that merits review by writ of certiorari of this

Court.

Finally, petitioner contends that this Court needs to resolve the split within the circuits and the State courts of last resort. However, because this case arises out of habeas corpus, this case is ill-equipped to do so. As shown above, reasonable jurists disagree about the correct answer to the question that petitioner poses, and that reasonableness determination forecloses any further review of this case under William v. Taylor, *supra*. In order for the Court to squarely consider the Pearce issue in this case, this Court would need a case on direct appeal (as Pearce was) from a State court or a federal circuit court as the Williams standard forecloses any answer to petitioner's question in a habeas case. Therefore, this case would not answer the question that petitioner seeks resolved, and thus certiorari is not necessary in this case.

CONCLUSION

For the foregoing reasons, the respondent prays that the Court enter its order denying the petitioner for writ of certiorari.

Respectfully submitted,

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